APPEAL NO. 040774
FILED MAY 21, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on March 2, 2004. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 10th (August 15 through November 13, 2003) and 11th (November 14, 2003, through February 12, 2004) quarters. The claimant appealed, disputing the determination of nonentitlement. The respondent (self-insured) responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated to the eligibility criteria of a compensable injury, impairment rating, no commutation of impairment income benefits, that Dr. W is the Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110 (Rule 130.110), Texas Workers' Compensation Commission (Commission) designated doctor, that the qualifying period for the 10th quarter is May 3 through August 1, 2003, and the qualifying period for the 11th quarter is August 2 through October 31, 2003. Section 408.142(a) and Rule 130.102 set out the statutory and administrative rule requirements for SIBs. The hearing officer's finding that the claimant's efforts to obtain employment during the 10th quarter qualifying period were to mechanically qualify for SIBs and were not genuine attempts to obtain employment was not appealed.

In the instant case, the hearing officer gave presumptive weight to the designated doctor's report, as required by Rule 130.110(b), and determined that the report was not contrary to the great weight of the other medical evidence. This was a factual call for the hearing officer to make, and his determination on the issue is not against the great weight and preponderance of the evidence. Use of the designated doctor for return-to-work determinations gives presumptive weight to the designated doctor's opinion over other evidence normally used to decide the Rule 130.102(d)(4) issues of inability to work, narrative report, and "other records." Texas Workers' Compensation Commission Appeal No. 022604-s, decided November 25, 2002.

We do not find error in the hearing officer's giving presumptive weight to the designated doctor. Nor do we find error in the hearing officer's finding that the great weight of the other medical evidence was not contrary to the report of the designated doctor. Whether or not the great weight is contrary to the report of a designated doctor is a question of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex.

Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The claimant argues that Rule 130.102(d)(4) should be interpreted to require only that the compensable injury is a producing cause of a claimant's inability to work. We disagree. Rule 130.102(d)(4) provides that the statutory good faith requirement may be met if the employee:

> (4) [has been unable] to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

In regard to the narrative report, Texas Workers' Compensation Commission Appeal No. 000835, decided June 5, 2000, and Texas Workers' Compensation Commission Appeal No. 002192, decided October 27, 2000, held that the narrative report from the doctor must specifically explain how the compensable injury causes a total inability to work.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a self-insured governmental entity with RCH Protect Cooperative as its third party administrator)** and the name and address of its registered agent for service of process is

KR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Margaret L. Turner
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

It appears to me that the hearing officer in the present case felt constrained to rule the way he did because of the Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 032173, decided October 9, 2003. His decision in the present case is certainly consistent with the majority opinion in Appeal 032173, in which the Appeals Panel reversed a hearing officer who had granted SIBs for the 9th quarter. Having dissented in Appeal No. 032173, I feel constrained to dissent in the present case. I stated as follows in dissent in Appeal No. 032173:

> With the deepest respect for my colleagues in the majority, I am constrained to dissent. I agree with the majority that the rules require that the inability to work be caused by the compensable injury, but I do not think that the rules provide that the compensable injury be the sole cause of the inability to work. If the compensable injury, in combination with other conditions, renders the claimant unable to work then I think the compensable injury is still a cause of the claimant's inability to work. It appears to me that is how the hearing officer in the present case interpreted the report of the designated doctor, and I think that such an interpretation is both reasonable and within the hearing officer's purview as the finder of fact. I also believe that it is consistent with Rule 130.102(d)(4).

To interpret the rule to mean that the compensable injury in isolation must be the sole cause of an inability to work would render the rule less that rationale in my view. First, it is axiomatic that the same injury may have a different effect on the ability to work of different individuals. Second, and more significantly, the present case illustrates how such a requirement would lead to results that simply do not appear to make any sense. It seems fairly clear that this claimant will never be able to work again, at least the designated doctor clearly states that is her opinion and the other medical evidence is consistent with that. If the claimant cannot qualify SIBs based upon her inability to work, the only remaining ways she could qualify for SIBs would be to seek employment, even though she could not perform any employment she obtained, or to seek retraining for employment she could not perform. What is more likely is that the costs of her support will be shifted from the self-insured, which undertook the responsibility for paying benefits for the effects of her injury, to the federal or local taxpayers.[1] This will happen in a case where it has been determined that the claimant had a 38% impairment rating as a result of her compensable injury and was working with her serious pre-existing health conditions prior to the compensable injury. I simply find it difficult to believe that the rule was intended to require this result.

For the same reasons that I would have affirmed the decision of the hearing officer in Appeal No. 032173, *supra*, granting SIBs for the 9th quarter, I would reverse the hearing officer in the present case and render a decision that the claimant was entitled to SIBs for the 10th and 11th quarters.

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Gary L. Kilgore
Appeals Judge

[1] In the same fact scenario where there is a private workers' compensation carrier, these costs will be shifted away from a carrier that accepted premium dollars to take the responsibility for providing benefits for the effects of the compensable injury.